No. 13-606

IN THE

Supreme Court of the United States

KAMAL PATEL,

Petitioner,

v.

JANET NAPOLITANO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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FEBRUARY 5, 2014

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REPLY BRIEF

This case poses two important questions that have divided lower courts.

First, should the Board of Immigration Appeals (BIA) obtain *Chevron* deference in cases concerning the meaning of U.S. nationality? That question poses a lopsided split in which only the circuit below (and the Government) believe that *Chevron* deference is appropriate. Resolution of this issue is outcome-determinative in this case and all similar cases in the Fourth Circuit.

Second, should a federal statute defining U.S. nationality be read according to its terms, such that persons can demonstrate their U.S. nationality by establishing their "permanent allegiance to the United States"? Mr. Patel, a number of courts, and (in at least one case) the United States itself have all argued that the answer is yes.

In an aggressive effort to defeat certiorari, the Government has equivocally suggested that this case could possibly become moot. That suggestion—which could be raised in *any* case—is meritless. Mr. Patel still has a live, vital interest in having his nationality determined, is still in custody, and in any event falls within exceptions to mootness.

I. THE GOVERNMENT'S EQUIVOCAL SUGGESTION OF MOOTNESS IS ILLUSORY

Without actually claiming that this case either is or necessarily will become moot, the Government asserts that there is a "substantial question whether this case will become moot by petitioner's release

from custody on January 28, 2014." Opp. 5. That claim is unfounded.

A. Mr. Patel Has An Ongoing, Vital Interest In Pursuing His Claim, Including Because It Bears On His Prospective Eligibility to Receive A U.S. Passport

Section 1503 of Title 8 of the United States Code affords a cause of action to any person who "claims a right or privilege as a national of the United States and is denied such right or privilege" by a federal department on the ground that he is not a national. Mr. Patel filed an action under § 1503 in order to gain access to certain prison programs wrongfully denied to him on the ground that he was not a U.S. national. There is no question that Mr. Patel had standing to make that request, which engendered a live controversy. The Government now contends that "any such denial, and any resulting injury, will end when [Mr. Patel] is released from custody upon completion of his sentence." Opp. 6.

Contrary to the Government's statement, Mr. Patel has not been "released from custody upon completion of his sentence." *Id.* Instead, Mr. Patel is currently in federal custody in Haskell, TX, and could be transferred to a different facility at the discretion of either the Department of Homeland Security or the Drug Enforcement Administration. Mr. Patel is actively assisting the DEA in a criminal prosecution, and is currently under consideration for deferral of removal and possible remand to DEA custody as a material witness in that matter. Thus, there is more than a "reasonable expectation" that Mr. Patel will "be subjected to the same action again," Opp. 7-8 (citing *Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011)). In-

deed, Mr. Patel can still suffer a loss of access to government benefits that are rendered available on the basis of U.S. nationality.

In addition, Mr. Patel has completed and is in the process of submitting an application for a U.S. passport, and that application implicates Mr. Patel's live action for a determination of his nationality status. Based on his assistance to the DEA, Mr. Patel may at some point be released from custody and permitted permanently to remain in the United States. Mr. Patel's stake in obtaining a passport is more than sufficient to maintain a live, active controversy in this case. For this separate and independent reason, this Court should reject the Government's attempt to avoid review by conjuring a vehicle problem.

Apparently recognizing that Mr. Patel's requested determination of nationality still has important implications, the Government equivocally suggests that Mr. Patel's claim should fail on the merits, given the Government's view that § 1503 may not apply to nationality determinations bearing on removability. *See* Opp. 7 n.1. But that suggestion—which the Government only elliptically advances in a footnote in its brief—is doubly flawed. First, Mr. Patel's ongoing suit and application for a passport are collateral to any removal proceedings and so do not fall within the statutory removal exception.

Second, and more importantly, the Government's § 1503 argument goes to the *merits* of Mr. Patel's claim and is irrelevant to mootness. Therefore, this Court can and should grant review of the questions presented here and, after reversing the decision below, remand for consideration of all preserved issues,

potentially including the Government's argument regarding the scope of § 1503.

B. In Any Event, This Case Falls Within Exceptions To The Mootness Doctrine For Voluntary Cessation And Capacity For Repetition While Evading Review.

Even if Mr. Patel lacked an ongoing, vital interest in pursuing his § 1503 claim, this case would still not be moot.

1. Under the voluntary cessation doctrine, Mr. Patel's claim cannot be moot.

As noted above, upon the expiration of his prison term, Mr. Patel was placed in a different form of governmental custody, pending potential deportation or other proceedings. Whether Mr. Patel's new custodial environment provides access to nationality-based rehabilitation programs is entirely a product of the Government's own voluntary action. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013).

The Government denies that this case involves voluntary cessation, but its argument is misplaced. According to the Government, the activity that has "ceased" is Mr. Patel's detention. But the only activity that may have ceased is (potentially) the Government's willingness to make certain programs available to Mr. Patel during his new detention.

If the Government's voluntary cessation analysis here were correct, then prisons and other detention facilities would be free to immunize their own conduct by modifying the availability of government programs and services. For example, the Government could deny prisoners access to nationality-based programs up until the moment that their cases came to

court—at which point the Government could quickly transfer the prisoner into a new mode of confinement where those programs were supposedly unavailable on a categorical basis. This is precisely the sort of conduct that the voluntary cessation doctrine is meant to deter.

2. In addition, Mr. Patel's case cannot be moot in light of the "capable of repetition yet evading review" doctrine. *Weinstein v. Bradford*, 423 U.S. 147, 148-149 (1975) (per curiam).

This exception to mootness applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). That test is satisfied here.

First, even if the "action" Mr. Patel challenges ceased upon the conclusion of his sentence (*but see supra* pp. 3-4) that action would be "too short to be fully litigated." *Id.* Because his claim was filed in June 2010 based on a denial of access to certain prison programs, Mr. Patel had less than four years to overcome the challenges prisoners face when pressing their legal rights.

Second, there is a "reasonable expectation" that Mr. Patel will "be subject to the same action again." *Id.* Indeed, Mr. Patel remains in governmental custody and seeks a U.S. passport in the event that he is eventually released from custody. Thus, Mr. Patel's nationality status is not just reasonably expected to arise again at some future time, but is actually likely to be a pressing issue in the immediate future.

In sum, the Government's ambivalent suggestion of mootness should be no obstacle to certiorari.

II. CERTIORARI IS WARRANTED TO RESOLVE AN ACKNOWLEDGED AND OUTCOME-DETERMINATIVE CIRCUIT SPLIT

This case satisfies the standard criteria for certiorari: it presents pure legal issues that are the subject of well-recognized, entrenched disagreement and that are outcome determinative in the case at hand. Therefore, this Court should grant review.

A. This Case Presents The Short Side Of An Acknowledged, Lopsided, And Outcome-Determinative Circuit Split Regarding The Applicability of *Chevron* Deference In Nationality Cases

1. As Mr. Patel demonstrated in his petition for certiorari, the decision below self-consciously created a lopsided (at least 4-1) circuit split as to whether *Chevron* deference applies in nationality cases under § 1252(b)(5). *See* Pet. 9-15. The Fifth, Ninth, Tenth, and Eleventh Circuits have all squarely held that *Chevron* deference is inappropriate in nationality cases due to the plain language of § 1252(b)(5), and the Second and Third Circuits appear to have arrived at that conclusion as well. *See id.* 9-12. Yet the Fourth Circuit has expressly broken from that widespread view. *See id.* 14-15. The Government nowhere disputes these critical points.

Instead, the Government suggests that certiorari is unwarranted because any disagreement among the courts of appeals simply reflects "different reasoning" leading toward "uniform conclusions." Opp. 12. But

the Government itself has demonstrated the cert-worthiness of this case by *rejecting* the *Chevron* analysis adopted by most courts of appeals. Again, *only the Fourth Circuit* below has adopted the Government's remarkable claim that—despite the plain text of § 1252(b)(5)—*Chevron* deference should still apply in nationality proceedings.

Furthermore, the circuit split as to *Chevron* is actually outcome determinative in this case, as well as in all other nationality cases within the Fourth Circuit. The key flaw in the Government's reasoning is its failure to appreciate the Fourth Circuit's decision in *United States v. Morin*, 80 F.3d 124 (4th Cir. 1996), which specifically adopted Mr. Patel's interpretation of the meaning of U.S. nationality. Given that settled Fourth Circuit holding, the *only* lawful way for the Fourth Circuit could rule against Mr. Patel was to break from at least four other courts of appeals in holding that *Chevron* deference applies in nationality cases. In doing so, the decision below entrenched a lopsided circuit split.

Thus, the Government is wrong to depict this case as a merely academic dispute over reasoning. The decision below did not simply invoke *Chevron* deference as one convenient means of achieving the same substantive outcome adopted in other circuits, as the Government would have it. Instead, the decision below rested *entirely* on its anomalous *Chevron* holding to achieve a substantive outcome that would otherwise have been impossible. If this Court reversed the decision below on the *Chevron* issue and then remanded, then the substantive outcome in this case would change—to the benefit of Mr. Patel and all

similarly situated persons in the Fourth Circuit. Certiorari is therefore warranted.

2. The Government attempts to defend the Fourth Circuit's outlier view that *Chevron* deference is appropriate in nationality cases, *see* Opp. 12-13, but these arguments are unpersuasive. As the Government recognizes, the Board of Immigration Appeals (BIA) is normally entitled to deference when it interprets the Immigration and Nationality Act. *See* Opp. 12 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)). But the Government elides that the *reason* for *Chevron* deference is that Congress is thought to have implicitly delegated lawmaking authority to the agency. This underlying justification for *Chevron*, deference to administrative agencies, is inapplicable when Congress overrides the default assumption of implied deference and instead indicates that the Judiciary—not the Executive—should play the lead interpretive role. Here, federal law specifically provides that "*court[s]* shall decide the nationality claim"—not the BIA. 8 U.S.C. § 1252(b)(5) (emphasis added). Therefore, *Chevron* deference as to the purely legal definition of "national" is inappropriate under the plain meaning of the statute.

The Government also elides the key analytic move that allowed the Fourth Circuit to break from all other courts of appeals to have addressed this question. In the Government's telling, *Fernandez v. Keisler*, 502 F.3d 337 (4th Cir. 2007), simply concluded that Section 1252(b)(5) did not call for courts to "abandon [their] normal" *Chevron* deference. Opp. 13 (citing *Fernandez*, 502 F.3d at 343). This summary suggests that, in the view of the *Fernandez* court, Section 1252(b)(5) was best read not to withdraw *Chevron*

deference. But that is not what *Fernandez* actually concluded. Instead, *Fernandez* suggested that other courts of appeals *had* read Section 1252(b)(5) correctly as a repudiation of the normal rule of *Chevron* deference. *Fernandez* then relied on a novel clear-statement rule, such that only an especially clear legislative statement could override *Chevron* deference. *See* Pet. 14-15 (citing *Fernandez*, 502 F.3d at 342). That clear-statement rule has no support in the precedents of this Court, is contrary to the theory of implied delegation underlying *Chevron*, and independently warrants this Court's review.

B. This Court Should Also Resolve Lower-Court Disagreement As To Whether § 1101(a)(22) Affords Nationality To Persons Who Owe Permanent Allegiance To The United States

1. As Mr. Patel has shown, the plain text of § 1101(a)(22) confers nationality on persons who demonstrate "permanent allegiance to the United States." On its face, that phrase calls for a judicial inquiry into whether Mr. Patel has demonstrated the requisite allegiance. And, as the panel below recognized, the Fourth Circuit has adopted precisely that reading. In *Morin*, the Fourth Circuit concluded that an individual who had applied for citizenship (among other things) had thereby demonstrated his "permanent allegiance" and U.S. nationality. Notably, *Morin* adopted that view with the express support of the United States. Indeed, the United States obtained a criminal conviction predicated on the view that the Government now asserts to be erroneous.

As the Government observes, *see* Opp. 7, the Fourth Circuit subsequently chose not to follow

Morin, but only by breaking from the consensus view among courts of appeals and applying *Chevron* deference in nationality cases. *See supra* Section II.A. In other words, the Fourth Circuit *still* holds that the best reading of § 1101(a)(22) is that nationality should be extended to persons such as Mr. Patel who have lived in the United States for an extended period of time and sincerely applied for U.S. citizenship. That disagreement warrants this Court's review—particularly in light of the independent certworthiness of the *Chevron* argument on which the Government relies. *See supra* Section II.A.

The Government also points out that a number of other courts of appeals have adopted its preferred interpretation, *see* Opp. 8 (collecting cases), but that division of opinion among courts of appeals only demonstrates that there is divided authority on this point meriting further review. Moreover, Mr. Patel has shown that numerous district court decisions have applied inconsistent definitions of U.S. nationality in Foreign Sovereign Immunity Act (FSIA) cases, as well as employment discrimination cases. *See* Pet. 19-22. These decisions, which bear on important issues of individual rights and international affairs, frequently follow the view of nationality espoused by Mr. Patel and the Fourth Circuit in *Morin*.

To choose the most recent example, a June 2013 decision of the District Court of the District of Columbia adopted Mr. Patel's interpretation, based in part on *Morin*. *See Han Kim v. Democratic People's Rep. of Korea*, 950 F. Supp. 2d 29 (D.D.C. 2013). The Government discounts this decision as an inexplicable error in light of earlier D.C. Circuit precedent, *see* Opp. 10-11 n.2 (citing *Lin v. United States*, 561 F.3d

502, 508 (D.C. Cir. 2009)), but it is the Government that has erred. In *Lin*, the D.C. Circuit found a political question, *see id.* at 508, so its statements on the meaning of nationality are dicta. In any event, *Lin*'s dicta suggested only that "attitudes of permanent allegiance" exhibited by inhabitants of Taiwan were insufficient to create U.S. nationality. *Id.* That statement, even if viewed as precedent, would be a far cry from rejecting Mr. Patel's claim.

2. The Government's reading of § 1101(a)(22) is also unpersuasive—indeed, contrary to any reasonable reading of the statute. The statute provides that the term "national" would reach "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). That sentence has a plain meaning requiring nationality to be conferred on those owing "permanent allegiance to the United States." According to the Government, however, the statute is actually a coded message meaning something entirely unrelated to its plain meaning. In particular, the Government cites a snippet of *dictum* from the footnote of a dissenting opinion in an irrelevant case about gendered citizenship requirements—not the meaning of § 1101(a)(22). *See* Opp. 9 (citing *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting)). Based on that citation, the Government posits that the statute actually encompasses "persons who are born in *certain* United States territories whose residents are not entitled to citizenship, in addition to children born to non-citizen national parents abroad." *Id.* 10 (emphasis added). The Government does not even attempt to explain how the words at issue could actually convey something so complex and utterly foreign to their straightforward, plain mean-

ing. If Congress had wanted to convey the Government's meaning, it would not have used the phrase "permanent allegiance," which—on the Government's view—are rendered surplusage.

The Government attempts to justify its atextual reading by urging that the INA "sets forth detailed procedures through which status as a 'national' may be obtained," and "it would undermine this statutory framework if aliens could acquire or re-obtain nationality, without complying with applicable procedures." Opp. 9 (citing 8 U.S.C. §§ 1421-1458). But those provisions pertain to the *naturalization* process and so are entirely consistent with the plain meaning of § 1101(a)(22), which concerns only nationality (not citizenship). Furthermore, if the Government were correct that these naturalization procedures somehow cut against Mr. Patel's reading, they would equally cut against the Government's reading, which likewise recognizes that many people are U.S. nationals, even though they have never completed the naturalization process. In any event, the Government does not have authority to pick and choose which of the congressionally provided means of obtaining U.S. nationality it likes. Instead, the Government must follow *all* the instructions that Congress has provided, including § 1101(a)(22).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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